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EU Military Procurement Regulation VS. Global Security Politics

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The EU's challenge of regulating military procurement in a context of national sovereignty

- Directive 2009/81/EC on public contracts in the fields of defence- and security
 - **Aim and means:** fostering the EU's **strategic autonomy** through – internal market-based - procurement liberalisation
 - **Limited impact on European military industries:**
 - because Member States still predominantly rely on Article 346 TFEU to procure domestically based on their exclusive **national security** competence (Article 4(2) TEU)
 - because **intergovernmental** frameworks are generally excluded from the application of the Directive
 - **Underlying problem:**
 - The function of military procurement is rooted in the *military logic* of global security politics while its regulation is based on the *economic logic* of the internal market
 - Wrong legal basis?



The function of military procurement (the *military logic*): the conceptual roots of the problem

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- The function of military procurement is to maintain and/or increase **military power** which is considered a crucial asset to a state's national security
 - by procuring equipment superior to that of (potential) rivals
 - in addition, states seek to:
 - strengthen domestic industries to increase military **independence**
 - strengthen military **interdependence** within alliances (EU or NATO)
- The security approach of the EU Treaties:
 - military power (like the function of military procurement) is **conceptually** rooted within *national sovereignty* and *intergovernmental* alliance (Art. 4 TEU and Art. 42 TEU)
 - it **should contribute to** national security as well as European and global peace & security (so should its regulation) (Art. 3 and Art. 4 TEU)
 - How does this affect procurement regulation?



Looking forward: Addressing the EU's challenge by legal research

How to address the EU's challenge from the perspective of (value-based) EU law?

- Approach the regulatory problem from its roots (law & politics) by distinguishing between the source (*political sovereignty*) and purpose of military authority (*peace & security*)
 - i. the international context of security politics based on the **concept** of military power and the function of military procurement therein
 - **interdisciplinary** approach to understand the potential **effectiveness** of regulation
 - ii. the meaning of national sovereignty within EU law in light of the EU's **constitutional** purpose (Article 3(1) TEU)
 - how does this affect the systematic and teleological **legal interpretation** of security derogations and the **legitimacy** of the EU?
 - iii. prospects for better regulation
 - building on a **theoretical** framework in which the concepts of national security, sovereignty and European peace & security are understood in light of the EU's constitutional purpose and its division of competences

The function of military procurement in accordance with EU law?

- The described function fits international- and primary EU law as
 - there is no general prohibition on arming (ICJ, *U.S. v. Nicaragua*) for effective self-defence
 - territorial integrity and national security are 'essential state functions' (Article 4(2) TEU)
 - protection of domestic industry can be justified when the industry is "of fundamental importance for a country's existence" (CJEU 72/83, *Campus Oil*, 1984)
 - National security should not be considered in isolation of international peace & security (CJEU, C-83/94, *Leifer* and C-70/94, *Werner* 1995)
 - NATO obligations may take precedence over EU secondary law obligations (Article 42(7) TEU and Article 351(1) TFEU)